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Guantanamo Bay Detentions Comply With Domestic and International Law

Executive Summary

- There are many public misperceptions about the purpose and administration of the detention facility at Guantanamo Bay. An objective review of the situation inexorably leads to the conclusion that the facility is maintained in accordance with both international and domestic law.

- The enemy combatants held there do not merit the protections of the Geneva Conventions because Al Qaeda is not a party to the Conventions, and terrorists, by definition, do not fight in accordance with the recognized international laws of war. Even so, the President has made it clear that it is the policy of the United States to treat detainees humanely and in a manner consistent with the Geneva Conventions.

- Detaining enemy combatants for the duration of hostilities is a universally recognized right under the international laws of war. Detention is first and foremost to prevent individuals from returning to the battlefield. It also serves the purpose of interrogation to gather intelligence. It is not the same as detention for criminal justice purposes.

- Congressional action, Supreme Court precedent, and historical practice support the President's selective prosecution of the most egregious violators of the laws of war in a military commission. And last week, an appellate court determined that the military commissions specific to the Global War on Terrorism are lawful for this purpose.

- The Combatant Status Review Tribunals ("CSRT") provide the detainees a process to challenge their enemy combatant designation.

- Releasing an enemy combatant in the CSRT process is not without risk, as it is estimated that at least 12 released detainees have returned to the battlefield against the United States.

- Congress should ratify the various procedures afforded the enemy combatants. At a minimum, Congress should remove detainee access to federal court through the federal habeas corpus petition.

Introduction

Public misperceptions persist about the purpose and administration of the detention facility at Guantanamo Bay Naval Base. Much of the domestic and international criticism that leads to this public misperception is based on incorrect information. This paper provides an objective review of the situation to demonstrate that the facility is maintained in accordance with both recognized domestic and international law. It further notes that the detention of enemy combatants at the Guantanamo Bay facility is primarily for the purpose of preventing their return to the battlefield, and is not for any criminal justice purpose, such as detention prior to trial, or as punishment after conviction. There are, however, limited instances in which it may be in order to prosecute detainees for crimes in the various available forums, including a military commission. These commissions comport with Supreme Court precedent and historical practice. The paper concludes by outlining the various actions Congress should take with respect to the detainees at Guantanamo Bay.

Background

In response to the terrorist attacks of September 11, 2001, the President deployed the United States armed forces to find, interdict, capture, or kill members of the Al Qaeda terrorist network and its supporters. As part of that incapacitation effort, members of Al Qaeda captured during the Global War on Terrorism are detained at facilities around the world. Towards this end, the United States established a detention facility at its naval base in Guantanamo Bay, Cuba in 2002 because the United States needed a safe and secure location to detain individuals captured on the battlefield in the Global War on Terrorism. The United States spent more than $100 million to construct the detention facility, and it spends approximately the same amount on an annual basis to maintain it.

There is an elaborate, multi-level screening process that an individual who is taken into custody goes through to determine if transfer to the Guantanamo Bay detention center is warranted.[1] And, since January 2002, approximately 800 suspected Al Qaeda or Taliban members have been sent to the facility. Currently, there are approximately 520 detainees at the facility, none of whom is from the war in Iraq. These detainees are highly trained and dangerous members of the Al Qaeda terrorist network, namely terrorist trainers, recruiters, bomb-makers, operatives, and financiers.[2]

Reasons for Detention

There is a military purpose to these detentions that is in no way related to the criminal justice system. Individuals are detained at the facility to prevent them from returning to the battlefield, in keeping with customary and positive international law. The detentions also provide the government an opportunity to interrogate them in order to gather intelligence. There

[1] Press briefing by Paul Butler, Principal Deputy Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, on detainee operations at Guantanamo Bay (Feb. 13, 2004), available at http://www.defenselink.mil/transcripts/2004/tr20040213-0443.html.

[2] Department of Defense, JTF-GTMO Information on Detainees (Mar. 4, 2005), available at http://www.defenselink.mil/news/Mar2005/d20050304info.pdf.

may be, however, limited instances in which the President may determine that it is in the interests of the United States to prosecute some detainees for serious crimes. There are various options available by statute to that end, such as trial before a criminal court or military commission. This section addresses the reasons for detention and some of the options for prosecution, and lays the foundation to demonstrate how the detention of these terrorists is consistent with domestic and international law.

Preventing Return to the Battlefield Is a Universally Recognized Reason

The Supreme Court acknowledged that the international law of armed conflict recognizes by "universal agreement and practice" that the primary purpose behind the capture and detention of enemy combatants is to prevent their return to combat to take up arms once again.[3] The Supreme Court has also recognized that the international laws of war concomitantly authorize the detention of enemy combatants for the duration of hostilities because, if they were released before the cessation of active hostilities, they could return to the battlefield.[4] Although the United States can legally hold these detainees for the duration of the conflict, it is the government's clear desire to hold them only as long as is necessary.[5]

Custodial Interrogation Provides Valuable Intelligence

Just as detention absolutely prevents the detained individual from killing Americans, interrogation of the detainee to learn information both thwarts attacks against the U.S. homeland and saves the lives of U.S. and coalition forces overseas. Thus, interrogation is an integral element of our strategy in the War on Terrorism because the United States does receive valuable intelligence from the interrogation of detainees.[6] For example, in his declaration to a federal district court, the Director of the Defense Intelligence Agency, Vice Admiral Lowell Jacoby, "estimated that more than 100 additional attacks on the United States and its interests have been thwarted since 11 September 2001 by the effective intelligence gathering efforts."[7] Moreover, a Presidential Commission studying this country's intelligence capabilities specifically found that a critical source of terrorist plans and operations "is the interrogation of captured detainees."[8] Finally, it is difficult to publicize particular benefits of intelligence gained through interrogation, as President Bush cautioned that some of this country's actions in the War on Terrorism will be "secret even in success."[9]

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[3] *Hamdi v. Rumsfeld*, 542 U.S. 507, __, 124 S. Ct. 2633, 2640 (2004) (plurality opinion).
[4] *Hamdi v. Rumsfeld*, 542 U.S. 507, __, 124 S. Ct. at 2640 (citing, *inter alia*, Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 Art. 118, 6 U.S.T. 3316, 3406, 75 U.N.T.S. 135, 224).
[5] Rear Admiral James M. McGarrah, Director of Administrative Review of the Detention of Enemy Combatants, in prepared testimony before the Senate Judiciary Committee hearing regarding detainees, June 15, 2005.
[6] Department of Defense News Release No. 592-05, "Guantanamo Provides Valuable Intelligence Information," June 12, 2005.
[7] Declaration of Vice Admiral Lowell E. Jacoby, Defense Intelligence Agency Director, p. 8, *Padilla v. Bush*, 233 F. Supp. 2d 564, Case No. 02 CIV 4445 (S.D.N.Y. 2002).
[8] Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction, Final Report to the President (U), p. 373 (March 31, 2005).
[9] President George W. Bush, address before a joint session of the Congress of the United States in response to the terrorist attacks of September 11, 2001 (Sept. 20, 2001).

Thus, it is of prime importance that the setting for interrogation be such that the interrogators can practice the well-developed interrogation process.[10] One critical feature of the intelligence process is that it must be continuous, while another is that obtaining valuable information from a subject can take an extended period of time.[11] Disruption of the process at Guantanamo Bay, namely through the introduction of counsel into the detainee-interrogator relationship, has been devastating to the intelligence-gathering goal.[12] Moreover, individuals given access to detainees, such as counsel, could unwittingly provide information to the detainee, or be used by the detainee to communicate to the outside world.[13] Democratic Congresswoman Ellen Tauscher (D-CA) specifically recognized that there is "contemporaneous intelligence value" for even those detainees who have been held for several years. In a recent House Committee hearing, she stated, "It's hard to believe that somebody [who has] been in captivity for three years actually knows something that is worthwhile about current operations that are going around the world in the terrorist business. But they apparently do."[14] Ultimately, impairment of the interrogation process undermines intelligence-collection efforts and, consequently, harms the effort in the Global War on Terrorism.[15]

Detentions Are For Security Purposes, as Opposed to Criminal Justice

The United States is currently engaged in a *war* against terrorists. The essence of a military conflict is the destruction of the enemy's forces, either by killing or capturing them. In the case of capture, they are held simply by virtue of their status as enemy combatants, because imprisonment is a simple war measure "devoid of all penal character."[16] In this regard, the claim that these non-citizen detainees are somehow entitled to a criminal trial or have full Fifth Amendment due-process rights is inapposite, because the detention of enemy combatants is not a matter committed to the criminal justice system.

Prior to September 11th, it is true that terrorism was viewed as a law-enforcement problem, rather than as a military problem to be addressed accordingly.[17] The situation is different today. The necessary constraints for domestic law enforcement stand in marked contrast to situations in which the Executive is exercising its national-defense powers to combat an external threat. It would be inappropriate for due process concerns to hinder the military effort.[18] It would fundamentally alter the character and mission of the U.S. armed forces if the

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[10] A discussion about the methods of interrogation is beyond the scope of this paper.
[11] Jacoby, p. 6 (stating that there are "numerous examples of situations where interrogators have been unable to obtain valuable intelligence from a subject until months, or, even years, after the interrogation process began").
[12] *See* Jacoby, pp. 4, 6-7.
[13] Jacoby, p. 9.
[14] Representative Ellen O. Tauscher (D-CA), in remarks at the House of Representatives Armed Services Committee hearing on Guantanamo Bay Detainee Operations, June 29, 2005.
[15] Jacoby, p. 9.
[16] *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2640 (quoting W. Winthrop, Military Law and Precedents 788 (rev. 2d ed. 1920)).
[17] *See* 9/11 Commission Final Report, p. 73 ("Legal processes were the primary method for responding to these early manifestations of a new type of terrorism."); 9/11 Commission Final Report, p. 72 (noting how the "impression that the law enforcement system was well-equipped to cope with terrorism" developed in response to the first World Trade Center bombing in 1993).
[18] Former Attorney General William P. Barr, in prepared testimony before the Senate Judiciary Committee Hearing regarding detainees, June 15, 2005.

demands of due process were placed upon them when they encounter terrorists on the battlefield, where their primary purposes is the rapid destruction or capture of the enemy.[19]

With few exceptions, the detentions at Guantanamo Bay are in no way related to the criminal justice purposes of detention any more than the detention facility itself is a part of the nation's federal prison system. Rather, the detentions form an integral element to military and intelligence activities in an ongoing war.

Criminal Charges Are Brought Only In A Very Limited Number of Cases

Just as in past wars where the vast majority of the enemy captured is simply detained until the conflict is over, most of the detainees from the Global War on Terrorism will be held as enemy combatants. However, as with past conflicts, a few—especially leaders, or those guilty of the most heinous war crimes—may be singled out for criminal prosecution. This prosecution can take place in various forums, such as a military commission.[20]

The government considers various factors in its decision as to whether any detainees will be prosecuted.[21] The most common ground for prosecution is violation of the laws of war in such a profound way that justice demands a punitive sentence for the perpetrator, either death or detention beyond the end of hostilities. The government also considers the likelihood of conviction, given the available evidence and the need to protect intelligence sources and methods. In addition, there may be a limited public deterrence aspect to this calculation, as the United States may wish to signal its intention to prosecute some of its enemies for the purposes of dissuading other terrorists. These factors constitute the national security equivalent of "prosecutorial discretion."

There is another factor that justifies the decision to prosecute: the unique character of this war and unique nature of Al Qaeda operatives. Some detainees at Guantanamo are simply too dangerous to ever be released. In the format of a traditional war, there would be an organized government that could control the actions of its returning captured combatants. Moreover, in a traditional war, a formal peace between warring nations would mitigate any hatred that particular individual combatants may still harbor towards the enemy nation. In this regard, it would be less of a threat to release such individuals back to their countries of origin; yet, such a condition does not apply with respect to Al Qaeda operatives. They profess no allegiance to a governing authority, and there is no indication that they would return to a civilian, non-combatant type life. Therefore, the prosecution, conviction, and punitive detention of the most serious war criminals may be necessary to prevent them from taking up arms against the United States again, even after hostilities are deemed complete.

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[19] Barr.

[20] In addition to trials before a military commission, trials before a federal district court or a general court martial may also be an option. W. Hays Parks, Special Assistant for Law of War Matters to the Army Judge Advocate General, in prepared testimony before the House Armed Services Committee hearing regarding Iraq's violations of the law of armed conflict, April 4, 2003. For example, John Walker Lindh and Richard Reid were charged in federal court. *United States v. Richard Colvin Reid*, Case No. 02-10013-WGY (D. Mass.); *United States v. John Phillip Walker Lindh*, Case No. 02-37-A (E.D. Va.).

[21] Department of Defense News Release No. 648-04, "Presidential Military Order Applied to Nine More Combatants," July 7, 2004.

Three examples from the set of detainees who have so far been designated for trial before a military commission illustrate how the government will decide who to prosecute. Salim Ahmed Hamdan was clearly more than just a "soldier." On July 3, 2003, the President "determined 'that there is reason to believe that [Hamdan] was a member of al Qaida or was otherwise involved in terrorism directed against the United States.'"[22] "On July 9, 2004, Hamdan was formally charged with conspiracy to commit [, among others,] the following offenses: 'attacking civilians; attacking civilian objects; . . . and terrorism.'"[23] The government alleges that Hamdan, in furtherance of the conspiracy, was a bodyguard and personal driver of Osama Bin Laden specifically during the time of Al Qaeda's bombing of U.S. embassies in Tanzania and Kenya, and that Hamdan delivered weapons to Al Qaeda members.[24]

The actions of others referred for trial before a military commission on charges of conspiracy to commit terrorism also show involvement with Al Qaeda leadership. For example, Ibrahim al Qosi is alleged to have been crucial to the financial workings of Al Qaeda, and to have served as a personal bodyguard and driver to Osama Bin Laden.[25] And Ali Hamza al Bahlul is alleged to have created several instructional and motivational recruiting videos for al Qaeda, and was personally ordered by Osama Bin Laden to create a video "glorifying" the attack on the USS Cole.[26]

The prosecution process involving the referral of charges is ongoing, allowing for charges to be brought against additional individuals should the government decide to proceed as such.[27] It is important to note that this selective prosecution is consistent with the treatment detainees would receive if they were accorded rights under the Geneva Conventions. Even if the Conventions applied, the detaining authority would have complete discretion as to which detainees it could try for war crimes and which it would hold until the end of hostilities for repatriation.[28] The United States may also delay repatriation so that a detainee properly convicted of war crimes can serve his complete sentence,[29] and the Geneva Convention, by its terms, does not prohibit the death penalty.[30] At this point in time, the President has found fifteen individuals to be subject to the jurisdiction of military commissions, of which four were referred

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[22] *Hamdan v. Rumsfeld*, Case No. 04-5393, slip op. at 4 (D.C. Cir. July 15, 2005) [bracket in original].
[23] *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 155-56 (D.D.C. 2004).
[24] *United States v. Salim Ahmed Hamdan*, Complaint ¶ 13, available at http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf.
[25] *United States v. Ibrahim Ahmed Mahmoud al Qosi*, Complaint ¶ 19, available at http://www.defenselink.mil/news/Feb2004/d20040224AlQosi.pdf.
[26] *United States v. Ali Hamza Ahmaad Sulayman al Bahlul*, Complaint ¶ 15, available at http://www.defenselink.mil/news/Feb2004/d20040224AlBahlul.pdf.
[27] *Cf.* Remarks of Donald Rumsfeld, Secretary of Defense, before the Greater Miami Chamber of Commerce, Feb. 13, 2004 (stating that enemy combatants "include not only rank and file soldiers who took up arms against the coalition in Afghanistan, but they include senior al Qaida and Taliban operatives, including some who may have been linked to past and potential attacks against the United States").
[28] Articles 82-108 of the Geneva Convention provide detailed measures addressing penal and disciplinary sanctions, none of which provide that the detaining authority must prosecute any particular detainee. On the other hand, the Geneva Conventions clearly contemplate and authorize the detention of detainees for the duration of hostilities. Geneva Convention Arts. 21 & 118.
[29] Geneva Convention Art. 119.
[30] Geneva Convention Art. 107.

for trial, including the cases of Hamdan, al Qosi, and al Bahlul discussed above.[31] As the government asserted in a recent court case, "this is not a procedure that has been broadly applied to the general population of detainees at Guantanamo Bay."[32]

Military Commissions Are The Appropriate Forum For Prosecuting Some Detainees

In the cases in which the government chooses to prosecute a detainee, the President has decided that military commissions are the appropriate forum. Indeed, legal experts assert that military commissions should serve as "the vehicle for the trial and punishment of at least the most serious categories of alleged terrorists."[33] There are sound policy reasons to employ military commissions in individual cases, and the commissions are legally proper as well.

The Supreme Court has both specifically recognized the lawfulness of military commissions and described the types of individuals who would be subject to such a forum. In reviewing the World War II military tribunals, the Court held that, in addition to capture and detention, it is wholly appropriate to try and punish unlawful combatants "by military tribunals for acts which render their belligerency unlawful."[34] It has further noted that enemy combatants who enter the country without a uniform for the purpose of destroying life or property are "familiar examples of belligerents who are generally deemed . . . to be offenders against the law of war subject to trial and punishment *by military tribunals*."[35]

On July 15, 2005, the D.C. Circuit Court of Appeals affirmed the government's right to try current terrorists before military commissions. The court held that, based on Congressional action and historical practice, the President has the authority to prosecute select enemy combatants before a military commission.[36] In particular, the court held that a military commission has jurisdiction over enemy combatants, and held that Congress has unequivocally authorized the President to convene military commissions to try an enemy combatant.[37]

The court also rejected the argument that, if the President wishes to try an enemy combatant before a military commission, the commission "must comply in all respects with the

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[31] J. Michael Wiggins, Deputy Associate Attorney General, in prepared testimony before the Senate Judiciary Committee hearing regarding detainees, June 15, 2005. It is crucial to note that this is a two-step process. First, the President must determine that an individual is subject to the jurisdiction of the military commission process. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism ¶ 2(a), 66 Fed. Reg. 57833 (Nov. 13, 2001). So far, he has done that for fifteen individuals. Second, the Department of Defense Appointing Authority may then issue orders appointing a military commission to try individuals so determined, *see* Department of Defense Military Commission Order No. 1 regarding Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism ¶ 2, namely by approving and referring charges against the individual. The Presidential decision is a necessary first step in that it creates personal jurisdiction over the individual. It does not necessarily follow that the individual will face a trial.

[32] *Hamdan v. Rumsfeld*, Case No. 04-5393 (D.C. Cir), Transcript of Oral Argument, p. 3:20-22.

[33] Kenneth Anderson, "What to Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base," 25 Harv. J. L. & Pub. Pol'y 591, 593 (2002).

[34] *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

[35] *Ex parte Quirin*, 317 U.S. at 31 (emphasis added).

[36] *Hamdan v. Rumsfeld*, Case No. 04-5393 (D.C. Cir. July 15, 2005).

[37] *Hamdan v. Rumsfeld*, slip op. at 9 ("[I]t is impossible to see any basis for Hamdan's claim that Congress has not authorized military commissions.").

requirements of the Uniform Code of Military Justice (UCMJ)."[38] The court specifically and expressly recognized the distinction in the UCMJ between courts-martial and military commissions.[39] In recognizing the distinction, the court held that the UCMJ "imposes only minimal restrictions upon the form and function of military commissions," and that the President's military order does not "violate any of the pertinent provisions."[40] Even with the limited number of UCMJ provisions applicable to military commissions, legal experts across the political spectrum note that the military commissions the President created "provide far greater procedural safeguards than any previous military commission, including Nuremberg."[41] Therefore, the most authoritative pronouncement to this point on the status of military commissions in the current circumstances has clearly held that the President may prosecute before military commissions those individuals who have violated the laws of war, as military necessity dictates.

Prisoners' Treatment is Consistent With Domestic Law

The President's detention of Al Qaeda terrorists complies with both the Congressional Authorization for Use of Military Force ("AUMF"),[42] and the two relevant 2004 Supreme Court decisions regarding the detention of enemy combatants.[43]

In response to the terrorist attacks of September 11, 2001, Congress on September 18, 2001 authorized the President "to use all necessary and appropriate force against" those organizations and persons that perpetrated the attacks for the purpose of "prevent[ing] any future acts of international terrorism against the United States" by said organizations and persons.[44]

In *Rasul v. Bush*,[45] a non-citizen (alien) detained at Guantanamo Bay brought a habeas corpus petition challenging the legality of his confinement. The Supreme Court held that a federal court has jurisdiction under the federal habeas corpus petition statute[46] to determine the legality of the Executive's detention of alien enemy combatants outside the United States.[47]

In *Hamdi v. Rumsfeld*,[48] it was a U.S. citizen who brought the habeas corpus petition. The case made clear that a U.S. citizen can in fact be held as an enemy combatant,[49] but a

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[38] *Hamdan v. Rumsfeld*, slip op. at 17 (noting this assertion to be "an error").
[39] *Hamdan v. Rumsfeld*, slip op. at 18 (stating that conflating courts-martial and military commissions "would obliterate" the distinction the UCMJ carefully makes between the two).
[40] *Hamdan v. Rumsfeld*, slip op. at 18.
[41] Jack Goldsmith & Cass R. Sunstein, "Military Tribunals and Legal Culture: What A Difference Sixty Years Makes," 19 Const. Comment. 261, 288 (2002).
[42] Authorization for Use of Military Force ("AUMF"), Pub. L. No. 107-40, 115 Stat. 224 (2001).
[43] *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004); *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686 (2004). *Rumsfeld v. Padilla*, 542 U.S. 426, 124 S. Ct. 2711 (2004), also addressed the detention of enemy combatants, but its outcome is not relevant to the Guantanamo detainees.
[44] AUMF § 2(a).
[45] *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686 (2004).
[46] 28 U.S.C. § 2241. It is crucial to note that *Rasul* is purely a statutory holding. The Court held that the statute applies extraterritorially, but it in no way speaks to what procedural rights an alien similarly situated may have under the Constitution.
[47] *Rasul*, 542 U.S. 466, __, 124 S. Ct. at 2699.
[48] *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633 (2004).

plurality of justices decided that due process requires that a citizen be given a meaningful opportunity to contest the factual basis of his detention. This most notably means that the citizen "receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[50]

The *Hamdi* Supreme Court case stands for the proposition that the detention of enemy combatants "for the duration of the particular conflict . . . is so fundamental and accepted an incident to war as to be an exercise of the 'necessary and appropriate force' Congress has authorized the President to use."[51] Moreover, *Hamdi* acknowledged that the purpose of the "detention [is] to prevent a combatant's return to the battlefield," and that "Congress has clearly and unmistakably authorized detention" for those purposes.[52]

Detainees are Entitled to Certain Procedural Rights by Statute

In its 2004 decisions regarding the detention of enemy combatants, the Supreme Court was primarily concerned with the process for determining whether an individual has been properly designated as an enemy combatant, but it largely left unaddressed what substantive rights alien combatants have under U.S. law. For all of the public discussion about the cases, all *Rasul* held was that the federal courthouse door is open to an alien to challenge his detention, but it does not at all demand that the court grant certain substantive rights to the detainees. A court may hear the claim, and then decide that the detainee has no rights.[53] Moreover, *Hamdi* most certainly rejected the notion that even a citizen is entitled to a full trial equivalent to that provided under the criminal justice system. The Court expressly acknowledged that "the Constitution would not be offended" if an enemy combatant proceeding were to allow for the admission of hearsay evidence, or even a presumption in favor of the government's evidence.[54] Simply put, if a U.S. citizen detained as an enemy combatant is not entitled to a full-blown trial regarding his classification as an enemy combatant, then an alien assuredly has no such right.

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[49] *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2640 ("There is no bar to this Nation's holding one of its own citizens as an enemy combatant.").
[50] *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2648-49.
[51] *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2640 (plurality opinion of four justices); *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2679 (Thomas, J., dissenting) (agreeing with the plurality that, at a minimum, the President has the authority to detain enemy combatants).
[52] *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2641.
[53] It is entirely possible that a Court could hold that it has jurisdiction to hear an enemy alien combatant's habeas petition, but that the alien has no cognizable Constitutional or statutory rights, and therefore the government's detention of him is not in violation of the Constitution or otherwise unlawful. *E.g. Khalid v. Bush*, 355 F. Supp. 2d 311, 320-28 (D.D.C. 2005) (noting that *Rasul* affords a non-citizen enemy combatant the procedural right to present a habeas petition to a federal court, but that said alien enemy combatant has no substantive constitutional or statutory rights, and hence rejecting the habeas petition).
[54] *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2649.

The CSRTs Provide the Detainees All the Process They are Due

The Executive responded to the principles of *Rasul* and *Hamdi* by creating Combatant Status Review Tribunals ("CSRT"), which provide both citizens and non-citizens alike a process to challenge their enemy combatant designation. With respect to U.S. citizens, the Court "requir[ed] independent procedural protections . . . to minimize the risk of erroneous classification of someone as an enemy combatant."[55] The Court has also noted that "the requirements of due process are 'flexible and cal[l] for such procedural protections as the particular situation demands.'"[56] Namely, the due process demands in the criminal justice setting may be entirely inappropriate in the enemy combatant setting.[57] In this regard, the CSRT process is wholly responsive to the Court's exposition about due process, and provides all the process that would be demanded for a U.S. citizen seeking to challenge his designation as an enemy combatant. The CSRT is specifically designed "to determine, in a fact-based proceeding, whether the individuals detained . . . at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation."[58] Since the CSRTs provide all the process that would be due a U.S. citizen in this case, they assuredly provide sufficient process for an alien seeking to bring the same challenge.

Prisoners' Treatment is Consistent With International Law

Prisoners Are Treated Humanely

For several reasons, the Geneva "Convention[s] do not apply to al Qaeda and its members" who are enemy combatants at Guantanamo Bay captured in the War on Terrorism.[59] First, enemy combatants do not fight on behalf of a state that is a signatory to the Conventions.[60] Nor do they wear the uniforms or insignia of such a state. More importantly, Al Qaeda members themselves do not fight in accordance with the Conventions, and, hence, do not merit their protections. In addition to disguising their status, they do not carry arms openly; and they violate the laws of war as a matter of practice, most notably by intentionally targeting civilians. A key rationale for treatment of prisoners by a set of rules was that it would provide an incentive for combatants to fight by a set of rules, namely the recognized laws of war. Thus, those who violate these rules of war are not entitled to the same protections as those who abide by them.

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[55] Curtis A. Bradley & Jack L. Goldsmith, Congressional Authorization and the War on Terrorism, 118 Harv. L. Rev. 2047, 2121 (2005).
[56] *Wilkinson v. Austin*, 125 S. Ct. 2384, 2395 (2005) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)).
[57] *Hamdi*, 542 U.S. 507, __, 124 S. Ct. at 2650 ("[T]he protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy-combatant setting.").
[58] Memorandum from the Secretary of the Navy to Distribution regarding Implementation of Combatant Status Review Tribunals Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba ¶ 1 (July 29, 2004), available at http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.
[59] *Hamdan v. Rumsfeld*, Case No. 04-5393, slip op. at 14 (D.C. Cir. July 15, 2005).
[60] *Hamdan v. Rumsfeld*, Case No. 04-5393, slip op. at 14 (D.C. Cir. July 15, 2005).

Nonetheless, the United States recognizes that, while the Geneva Conventions do not apply to Al Qaeda, customary international law[61] likely demands that the United States hold these prisoners under humane conditions. And, it is the unmistakable policy of the United States to do just that. For example, every terrorist detained at the facility has clothing, shelter, and basic hygiene items. They have the ability to send and receive mail and the opportunity to exercise. Most notably, these terrorists are permitted every opportunity to practice their faith, including a call to prayer five times a day in accordance with the beliefs of Islam.[62] Also, U.S. troops receive special training on how to treat the Koran reverently and consistently with the Muslim faith. Furthermore, every detainee has a prayer cup, prayer beads, and prayer oil. The International Committee of the Red Cross also has access to every detainee.[63] In short, it is and remains U.S. policy to treat these enemy combatants "humanely and . . . in a manner consistent with the principles of international law."[64]

Prisoners Are Given a Process to Challenge Their Detention

Even though the detainees are not entitled to Geneva Convention protections, the United States has given every single detainee at Guantanamo the opportunity to challenge the determination that he is an enemy combatant, just as he would be able to do under the Conventions. Article Five of the Third Geneva Convention states that a detainee shall be able to have his status determined by a "competent tribunal" if there is doubt as to that status.[65] As noted above, the Combatant Status Review Tribunals respond to such a requirement.[66] The CSRT procedures are modeled after Army Regulation 190-8, which is precisely how the United States implements its compliance with Article Five of the Geneva Convention when necessary. In this regard, whatever process would be afforded to the detainees under the protections of international law—to which they are not entitled—has in fact been provided to them, as each detainee at the facility has had his case adjudicated by the tribunal.

Potential Congressional Action

Although the United States is well within its legal rights to detain these enemy combatants for the duration of the hostilities, Members of Congress, recognizing that this conflict may continue for some time, should take various actions to address this concern.

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[61] Customary international law is a set of principles and practices that "results from a general and consistent practice followed by them from a sense of legal obligation." Restatement (Third) of the Foreign Relations Law of the United States §102(2) (1987).

[62] Army Brigadier General Jay Hood, Commander Joint Task Force Guantanamo & Command Sergeant Major Anthony Mendez, Joint Detention Group, Joint Task Force Guantanamo, remarks before the House Armed Services Committee hearing regarding Guantanamo Bay Detainee Operations, June 29, 2005.

[63] Army Brigadier General Jay Hood.

[64] Memo from President to Vice President, et al. regarding Humane Treatment of Al Qaeda and Taliban Detainees ¶ 3 (Feb. 7, 2002).

[65] Geneva Convention Art. 5.

[66] The government created the CSRTs primarily as a response to the Supreme Court demands in *Hamdi* and *Rasul*, though, of course, there is the associated benefit that the CSRTs provide rights under international law to which the detainees are not entitled.

Congress Should Ratify the Procedures Granted to the Enemy Combatants

Despite the consternation with the likelihood that this conflict may be one of indeterminate length, the reality is that an extended detention for some enemy combatants will be necessary. At this point, however, this issue is largely irrelevant and distracting. First, since active hostilities are ongoing, the detention of enemy combatants is clearly required. Next, the fact that the end of this conflict may not be as easily and readily identifiable as a formal peace treaty or armistice agreement does not in any way call into question either the right to detain an enemy combatant for the length of hostilities, or the underlying functional justification of preventing their return to combat.[67] Finally, even if it turns out that the detainees are held for an extended period, this is thoroughly consistent with historical precedent. For example, the last German World War II detainees left this country in July 1946.[68]

A way to mitigate the concern of extended detention is to institute a policy to detain a particular individual for as long as that individual remains a substantial threat to the national security of the United States.[69] In the absence of Congressional action implementing such a policy and process, the President created the Administrative Review Board ("ARB") process to accomplish precisely that objective. It is the purpose of the ARB process to assess, on an annual basis, whether each individual enemy combatant at the Guantanamo facility continues to pose a threat to the United States.[70] This policy does have risks, as at least 12 released enemy combatants have reappeared on the battlefield taking up arms against the U.S. armed forces. But generally, it should not be beyond the capacity of U.S. institutions to determine whether a particular individual poses a future threat to the United States. Individualized assessments of future dangerous behavior are common to other U.S. detention settings, such as proceedings related to criminal sentencing, pretrial detention, or civil commitment.[71] Moreover, the ARB process implements another tenet of U.S. policy in this area, which is to detain enemy combatants for only as long as is necessary.

If Congress were to ratify the use of military commissions and CSRT and ARB procedures, it would provide not only public support for the efforts by illustrating that this country's popularly elected representatives believe the use of these procedures is appropriate, but it would also advance the legal foundation for the President's efforts.[72] In the end, Congress should act to give its imprimatur to these procedures rather than have the courts continue to develop the body of law of this issue.[73]

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[67] Bradley & Goldsmith, 118 Harv. L. Rev. at 2124.
[68] Jonathan F. Vance (ed.), Encyclopedia of Prisoners of War and Internment, p. 340 (2000).
[69] Bradley & Goldsmith, 118 Harv. L. Rev. at 2125.
[70] Rear Admiral James M. McGarrah.
[71] Bradley & Goldsmith, 118 Harv. L. Rev. at 2125 n.339.
[72] *See Youngstown Sheet & Tube Co. v. Sawyer* (The Steel Seizure Case), 343 U.S. 579, 635 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum.").
[73] Even though Congress has the Constitutional responsibility to "make rules concerning captures on land and water," U.S. Const. Art. I, Sec. 8, cl. 11, this does not make the President's actions per se illegitimate. The President has "significant concurrent constitutional authority in the foreign affairs (and especially the war powers) field." Bradley & Goldsmith, 118 Harv. L. Rev. at 2086. Indeed, there is a "zone of concurrent authority" in which the President and Congress might act when the other has not. Bradley & Goldsmith, 118 Harv. L. Rev. at 2086 n.160

Congress Should Remove Enemy Combatant Access to Federal Courts

When considering what actions to take with respect to the Guantanamo detainees, Congress, at a minimum, should use its constitutional authority to overrule the statutory holding of *Rasul* so as to remove detainee access to federal courts through the habeas corpus petition. *Rasul* only interpreted the federal habeas corpus statute, 28 U.S.C. § 2241, which Congress is, of course, free to change.[74]

These individuals are not in a law-enforcement paradigm, detained as a prelude to trial; rather, they are in a military paradigm, detained to prevent their return to combat, as well as for intelligence gathering. Thus, they should not have access to federal courts. It has already been demonstrated how custodial interrogation provides invaluable intelligence to the War on Terrorism, that the process can be a lengthy one, and that any interruption of that process can be devastating to the intelligence collection effort. Amending the statute to make clear that it does not apply to properly classified enemy combatants would restore the integrity of the interrogation process and strike the proper balance with respect to the national security considerations involved in the judicial process. It also would not harm our sensibilities of the avenues available to these detainees to contest their designation as enemy combatants, as they already have recourse to the CSRT process.

Moreover, the CSRT process itself does not disrupt the interrogation process for both logistical and substantive reasons. Logistically, the process takes place at Guantanamo Bay, rather than on U.S. soil, and, hence, is less disruptive. Additionally, the detainee is not afforded the full panoply of rights offered in a federal court, to which he is not entitled anyway. The detainee, however, is provided a personal representative for the purpose of, for example, "assisting the detainee in connection with the review process."[75] At the same time, the CSRT is adjudicating a wholly different substantive question than might a habeas proceeding. The CSRT process is simply determining whether the detainee has been properly classified as an enemy combatant, whereas a federal court proceeding may wish to address and reach a whole variety of additional issues. The CSRT arrangement provides sufficient process for a fair and efficient adjudication of status in complete accordance with both domestic and international law.

Conclusion

Many public misperceptions surrounding the purpose and administration of the detention facility at Guantanamo Bay need to be corrected, one of the worst of which is that this is simply unfettered executive detention. This assertion is wholly incorrect, as the Supreme Court has recognized that detention of enemy combatants at Guantanamo Bay until the end of hostilities is

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(citing and quoting for this proposition Louis Henkin, Foreign Affairs and the United States Constitution 92, 94 (2d ed. 1996)).

[74] *Rasul*, 542 U.S. 466, ___, 124 S. Ct. at 2711 (Scalia, J., dissenting) ("Congress is in session. If it wished to change federal judges' habeas jurisdiction from what this Court had previously held that to be, it could have done so.").

[75] Memorandum from the Secretary of the Navy to Distribution regarding Implementation of Combatant Status Review Tribunals Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba ¶ 1(c) (July 29, 2004).

fully authorized by domestic law, is consistent with international law, and is in accordance with historical precedent. The President created a framework in which this policy is implemented, and Congress should lend its support to these procedures. In doing so, Congress must be sure that its actions do not disrupt the effective interrogation process administered at the detention facility. Finally, a recent court of appeals decision has confirmed that, in those special cases in which it is determined a prosecution is warranted, the military commissions established for that purpose satisfy all legal requirements.